

FEDERAL COURT OF AUSTRALIA

Tarsoo v Minister for Immigration and Border Protection [2018] FCA 695

Appeal from: *Tarsoo v Minister for Immigration & Anor* [2017] FCCA 149

File number: NSD 235 of 2017

Judge: **COLLIER J**

Date of judgment: 17 May 2018

Catchwords: **MIGRATION** – appeal from a dismissal of a judicial review application by the Federal Circuit Court of Australia of a decision refusing to grant a partner visa under the *Migration Act 1958* (Cth)

Legislation: *Migration Act 1958* (Cth) ss 5F, 54, 359, 359A, 357A
Migration Regulations 1994 (Cth) regs 1.15A(2)(c), 1.15A(3), Sch 2 cl 801.221

Cases cited: *SZHTI v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 702
The State of New South Wales v Canellis (1994) 181 CLR 309

Date of hearing: 16 and 23 August 2017

Registry: New South Wales

Division: General Division

National Practice Area: Administrative and Constitutional Law and Human Rights

Category: Catchwords

Number of paragraphs: 24

Counsel for the Appellant: The Appellant appeared in person

Counsel for the Respondents: Mr G Johnson

Solicitor for the Respondents: Mills Oakley

ORDERS

NSD 235 of 2017

BETWEEN: **MOHAMMAD YASFEER TARSOO**
 Appellant

AND: **MINISTER FOR IMMIGRATION AND BORDER**
 PROTECTION
 First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

JUDGE: **COLLIER J**

DATE OF ORDER: **17 MAY 2018**

THE COURT ORDERS THAT:

1. 1. The appeal be dismissed with costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

COLLIER J:

1 This is an appeal from a decision of the Federal Circuit Court, dismissing an application for review of a decision of the Administrative Appeals Tribunal (**Tribunal**). The Tribunal had affirmed a decision of a delegate of the Minister for Immigration and Border Protection to refuse the appellant a Partner (Residence) (Class BS) (subclass 801) visa (**partner visa**).

2 The appellant has sought orders in the nature of writs against the Federal Circuit Court. This is notwithstanding that he has also sought to engage the appellate jurisdiction of the Court, and the Federal Circuit Court is not named in this proceeding.

BACKGROUND

3 The appellant is a citizen of Mauritius who applied for a partner visa on 10 September 2012. His application was supported by a “sponsorship for a partner to migrate to Australia form” executed by Ms Elaina Chrysanthou, who is an Australia citizen. The form indicated that the appellant and Ms Chrysanthou met on 15 December 2009 and commenced a relationship after three months. On 3 November 2011 the appellant and Ms Chrysanthou decided to marry, and they were subsequently married on 5 February 2012.

4 On 16 April 2015, the appellant’s application was refused by the Minister’s delegate, who found that the criteria for the partner visa were not met. The delegate was not satisfied that the appellant and Ms Chrysanthou were in a genuine and continuing relationship. Clause 801.221 of Sch 2 of the *Migration Regulations 1994* (Cth) (the **Regulations**) sets out the criteria for a partner visa and pursuant to subcl (2)(c) the visa applicant is required to be the spouse or de facto partner of the sponsoring partner. ‘Spouse’ is defined in s 5F of the *Migration Act 1958* (Cth) (the **Act**), in particular s 5F(2) which provides:

- (2) For the purposes of subsection (1), persons are in a married relationship if:
 - (a) they are married to each other under a marriage that is valid for the purposes of this Act; and
 - (b) they have a mutual commitment to a shared life as a married couple to the exclusion of all others; and
 - (c) the relationship between them is genuine and continuing; and

- (d) they:
 - (i) live together; or
 - (ii) do not live separately and apart on a permanent basis.

5 Regulation 1.15A(3) of the Regulations lists the matters that the Minister must take into account when determining whether a visa applicant satisfies the definition of ‘spouse’ under the Act. These matters include the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and the nature of the persons’ commitment to each other.

THE DECISION OF THE TRIBUNAL

6 The appellant applied to the Tribunal for a review of the delegate’s decision. He was invited to provide further material to support the claim that the appellant and Ms Chrysanthou were in a spousal or de facto relationship. The appellant’s migration agent provided submissions and appeared on his behalf at a hearing on 16 May 2016. The Tribunal had also written to the appellant and invited him to submit a response to adverse information.

7 The Tribunal, after considered the financial and social aspects of the relationship, the nature of the household and the nature of their commitment to each other, affirmed the decision of the delegate on the basis that it also was not satisfied that the parties were in a genuine and continuing relationship with each other. The Tribunal made adverse findings as to the credibility of both the appellant and Ms Chrysanthou, and identified inconsistencies in their evidence and their limited knowledge of each other.

FEDERAL CIRCUIT COURT PROCEEDING

8 In the Federal Circuit Court, the appellant’s first ground of review asserted that the Minister made a jurisdictional error by denying the appellant procedural fairness under s 359 of the Act, and by failing to take into account relevant considerations. The primary Judge found that the Tribunal had complied with its obligations and that the appellant had not developed any argument as to the Tribunal’s noncompliance. Further, the primary Judge found that the Tribunal had invited the appellant to comment on adverse information, which the appellant did, and the primary judge was satisfied on the basis of the Tribunal’s reasons that the Tribunal had taken that response into account, contrary to the appellant’s complaint. The appellant did not identify other relevant considerations that had not been taken into account.

9 9 The second ground was concerned with the Minister's alleged failure to comply with ss 54, 359, 359A and 357A of the Act because the Minister denied the appellant procedural fairness, failed to act in a way that was fair and reasonable and failed to take into account relevant considerations and information. The primary judge found that s 54 of the Act was not a basis on which any legal error could be made by the Tribunal, and held that the no instance of noncompliance with ss 359A or 357A had been identified. The primary Judge also found that it was made clear to the appellant that the key issue concerned the genuineness of his relationship with Ms Chrysanthou and, further, that the adverse credibility findings made by the Tribunal against the appellant were open to it and supported by a logical and reasonable basis.

GROUNDS OF APPEAL

10 10 The appellant has advanced four grounds of appeal.

11 11 First, the appellant alleged that the Federal Circuit was legally unreasonable and set out five particulars of this:

- (i) Failure to explain the hearing process to the appellant adequately.
- (i) Failure to explain to the appellant the consequence of his case being dismissed if the Federal Circuit Court found the Tribunal's decision was not affected by relevant legal error.
- (ii) Failure to take into account the appellant's submissions from the bar table.
- (iii) Failure to take into account that the appellant was unrepresented at hearing.
- (iv) Failing to put the appellant on notice that his credibility was in question and a failure to consider all of the circumstances of the case in forming that conclusion.

(Numbering error in original.)

12 12 As to the first two particulars, the respondent submitted that there was no evidence that procedural fairness had not been afforded to the appellant, especially in circumstances where the appellant did not tender a transcript of the hearing. The primary Judge's reasons indicated that the hearing process had been explained to the appellant and the primary Judge was not required to explain the consequences of the case being dismissed.

13 13 As to the third particular, the respondent submitted that the appellant did not identify which arguments were not considered but, in any case, the respondent noted that the primary judge made reference to a submission advanced by the appellant from the bar table in the reasons.

14 14 The respondent submitted that the fourth particular was unclear as to whether the appellant was arguing that his grounds should be treated more leniently or whether he was entitled to legal representation. In respect of the first possibility, the respondent submitted that the primary Judge was simply required to apply the law and determine the matter by reference to the evidence and arguments of the parties. There is also no entitlement to legal representation in judicial review proceedings, as is clear from such authorities as *The State of New South Wales v Canellis* (1994) 181 CLR 309 and *SZHTI v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 702.

15 15 Second, the appellant contended that the Federal Circuit Court misinterpreted, misunderstood or misapplied the law. Specifically, that was said to be a result of the primary judge determining that the appellant had received a genuine and meaningful hearing in relation to the dispositive issues at the Tribunal. The respondent submitted that there is no basis for this ground since this finding was open to the primary judge having regard to the Tribunal's reasons.

16 16 Third, the appellant alleged that the primary judge incorrectly formed the conclusion that the appellant's assertion that he had provided all the evidence was an assertion that the appellant was seeking merits review. The respondent submitted that it was open to the primary Judge to find that the appellant was asking the Federal Circuit Court to engage in merits review. The respondent further noted that the comment by the primary Judge was not seeking to discredit the appellant but was simply a rejection of that particular ground of appeal.

17 17 Fourth, the appellant submitted that the Federal Circuit Court erred in not providing a satisfactory opportunity to the appellant to make submissions from the bar table. The respondent submitted that there is no indication that the appellant was not afforded the opportunity to make submissions and the primary Judge indicated in the reasons that it was explained to the appellant that he would have the opportunity to make oral submissions, which the appellant did.

CONSIDERATION

18 18 The appeal was originally listed for hearing at 2.15 pm on 16 August 2017, however when the Court contacted the appellant after he failed to appear it appeared that he had confused the listing date. Accordingly the hearing of the appeal was adjourned to 10.15 am on 23 August 2017.

19 19 The appellant appeared in person. At the hearing the appellant submitted that the decision of the primary Judge had been unfair to him. In particular he submitted:

MR TARSOO: I said I reckon the decision what the court has been made on my case has not been fair enough on my side.

HER HONOUR: It has not been fair to you?

MR TARSOO: Yes.

HER HONOUR: All right. And why is that?

MR TARSOO: Because I brought all my – all my approval and all my forms, which – which I was not wrong but, yes, I still find it's – yes. The court just made a decision I'm still wrong.

HER HONOUR: Okay. So when you say what you do, you're talking about your grounds of appeal; is that right?

MR TARSOO: Yes.

HER HONOUR: Because you say in your grounds of appeal, for example, that the Federal Circuit Court failed to adequately explain the hearing process to you, failed to adequately explain the consequences to you, failed to take in to account your submissions, failed to take into account that you're unrepresented, failed to put you on notice that your credibility was in question. That's ground 1. And there are three other grounds, of course, as well. What else do you want to say, Mr Tarsoo? Is that all?

MR TARSOO: That's all, pretty much.

20 20 A number of Mr Tarsoo's grounds of appeal, like his submissions, focused on the conduct of the hearing in the Federal Circuit Court rather than any jurisdictional error on the part of the Tribunal. However:

(1) (1) No transcript of the proceedings of the Federal Circuit Court were put before me to substantiate the appellant's claims;

(2) (2) At [24]-[25] the primary Judge observed:

24. On 26 September 2016, the Court made orders fixing the matter for hearing. The applicant was provided with an opportunity to file an amended application, affidavit evidence and submissions. No such documents were filed. At the commencement of the hearing, the Court explained to the applicant that this was a final hearing to determine whether the Tribunal's decision was affected by relevant legal error. The Court explained to the applicant the relevant legal error had to be either an excess of statutory power, or a denial of procedural fairness by the Tribunal. The Court explained that in summary, this meant the Court was considering whether the Tribunal's decision was unlawful or unfair.

25. The Court explained to the applicant that it would have identified the

evidence, then hear submissions from the applicant, then hear submissions from the solicitor for the first respondent and then hear submissions from the applicant in reply. The applicant confirmed that he understood the nature of the hearing as explained by the Court.

(3) No error is discernible in the approach described by his Honour.

(4) (3) At [26] his Honour said:

26. From the bar table, the applicant asserted baldly the decision was unfair in circumstances where he provided all of the evidence. Nothing said by the applicant from the bar table identified any jurisdictional error. The bare assertion by the applicant that he had provided all the evidence was in substance an invitation to this Court to engage in an impermissible merits review. This Court does not have power to review the merits of the matter. Nothing said by the applicant identified any relevant legal error.

(5) No error on the part of the primary Judge is discernible from this statement.

21 21 The first and fourth grounds of appeal have no merit.

22 22 In respect of the second ground of appeal: in light of the detailed decision of the Tribunal, it was clearly open to the primary Judge to conclude that the appellant had received a genuine and meaningful hearing in relation to the dispositive issues at the Tribunal.

23 23 In respect of the third ground of appeal, to the extent that, before his Honour, the appellant asserted that he had provided all relevant evidence, it was clearly open to his Honour to conclude that the appellant was seeking merits review of the Tribunal's decision. Indeed in the absence of any other articulated basis for making this submission it was logical for the primary Judge to form the opinion that the appellant wished the Court to engage with the evidence and reach a different conclusion to that of the Tribunal.

24 24 In my view the appeal has no merit, and should be dismissed with costs.

I certify that the preceding twenty-four (24) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Collier.

Associate:

Dated: 17 May 2018